

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HAROLD B. SHAMBURGER,

Plaintiff,

v.

R. KIRKLAND, et al.,

Defendants.

C 07-4597 JSW (PR)

**[PROPOSED] ORDER
GRANTING DEFENDANTS'
MOTIONS TO DISMISS AND
FOR SUMMARY JUDGMENT**

Defendants Cook, Fischer, Foss, Kirkland, McGuyer, O'Neill, Pena, Randolph, Ruff, Smith, and Stewart (Defendants) moved under Federal Rule of Civil Procedure 12(b) to dismiss this 42 U.S.C. § 1983 action for failure to exhaust administrative remedies as mandated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). Defendants also moved under Rule 12(b)(6) to dismiss the claims against them because the claims are barred by the statute of limitations. Finally, Defendants moved under Federal Rule of Civil Procedure Rule 56 for this Court to grant summary judgment on the basis that no genuine issues of material fact are present here, that Defendants are entitled to judgment as a matter of law, and that they are entitled to qualified immunity.

A. Analysis Concerning the Motion to Dismiss.

Shamburger's allegations seem primarily concerned with his current placement in the Security Housing Unit (SHU), and the reliability of the evidence used to justify his retention in

1 the SHU. Because Shamburger was placed in the SHU in 1995, and he filed suit in 2007, any
 2 claim besides the issue of his continued SHU housing should be statutorily barred. Further,
 3 Shamburger identifies the administrative remedies related to this matter that he pursued, and
 4 these remedies concern only two issues: (1) that he was denied timely and meaningful 180-day
 5 committee reviews concerning his housing, and review by the Director's Review Board for
 6 prospective release to the general population; and (2) that the three source items used to
 7 determine that he was an active prison-gang member in 2006 were unreliable. The complaint is
 8 therefore confined to these two issues.

9 **B. Analysis Concerning Meaningful Housing-Committee Reviews and Reliable Evidence.**

10 **1. Shamburger Fails to Show a Denial of a State-Created Liberty Interest that**
 11 **Deserves Due Process.**

12 The undisputed evidence shows that between December 2001 and January 2008—a period
 13 of roughly six years—Shamburger received fifteen classification-committee reviews concerning
 14 his housing, which is three more reviews than the two-per-year requirement. Further, these
 15 committees all documented, in their reviews, that Shamburger refused to appear before them;
 16 Shamburger therefore appears ill-equipped to suggest due process was somehow lacking or short.

17 **2. Reliable Evidence Indicated Shamburger's Continuing Prison-Gang Activity.**

18 Shamburger remains in the SHU because evidence organized and presented to him in 2006
 19 demonstrated his continuing prison-gang activity, which threatens the safety and security of
 20 prisons, staff, and other inmates. To determine that an inmate is in a prison gang, leastwise that
 21 he remains active with the gang years later, a prison official must merely point to "some
 22 evidence" to support the decision justifying segregation in the SHU. *Toussaint v. McCarthy*, 801
 23 F.2d 1080, 1105 (9th Cir. 1986). Here, three reliable source items indicate Shamburger's active
 24 prison-gang participation, as explained in the declaration of Correctional Lieutenant Rice, an
 25 Institutional Gang Investigator at Shamburger's prison.

26 Further, Shamburger does not contest that he was able to dispute the validity of this
 27 evidence. Although he declined to dispute the evidence with the gang investigator who presented
 28 it to Shamburger, he did exhaust an administrative grievance through the prison system.

1 Because the evidence used to determine Shamburger's continuing prison-gang activity was
2 reliable, and because Shamburger has received all process due, Defendants are entitled to
3 summary judgment and, indeed, qualified immunity.

4 IT IS SO ORDERED.

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7 Dated: _____

8 HONORABLE JEFFREY S. WHITE
9 United States District Judge

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